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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 1 1996

In the Matter of	)	
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Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	
In the Matter of	)	
	)	
Telephone Company-Cable	)	CC Docket No. 87-266 (Terminated)
	)	
Television Cross-Ownership Rules,	)	
Sections 63.54-63.58	)	

COMMENTS AND PETITION FOR RECONSIDERATION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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COMMENTS AND PETITION FOR RECONSIDERATION
OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

NCTA is the principal trade association of the cable television industry. Its cable system members provide cable television services throughout the United States. Its programmer members offer the full range of satellite-delivered services that are offered to consumers over cable systems. The Commission's resolution of this proceeding will substantially affect NCTA's cable system and programmer members.

INTRODUCTION AND SUMMARY

Section 653 of the Telecommunications Act offers a regulatory alternative to franchised cable service. The alternative permits the operator of a cable-equivalent facility to offer programming directly to end-users without complying with local franchise requirements. The Act incorporates a conscious policy trade-off operators of open video systems voluntarily cede editorial control over up to two-thirds of their activated channel capacity in return for nearly complete relief from local franchise requirements.

This rulemaking will determine how the Commission should exercise its oversight necessary to enforce the trade-off. Will OVS be a genuine opportunity for other programmers and packagers to compete with the facility-provider's programming operation in attracting end-user subscribers? Or will it turn out to give the OVS operator so many advantages that competitors lack a real chance and consumers lack a real choice? The answers to these questions will determine whether or not OVS will represent a realistic business opportunity for unaffiliated programmers, and if the OVS arrangement will offer consumers accessing the OVS facility a genuine choice of programming packages.

In addition, this action and the related proceeding to be undertaken by the Common Carrier Bureau, will decide whether telephone ratepayers are adequately protected when telephone companies undertake the investments to make their integrated networks video-capable. The cost allocation issue repeatedly deferred in the video dialtone proceedings, can wait no longer.

NCTA urges the Commission, consistent with the statute and as elaborated below:

- To adopt effective cost allocation rules that prevent cross-subsidy, and that protect telephone ratepayers from being burdened by OVS investments;
- To implement a separate subsidiary requirement as a necessary safeguard to facilitate the detection of cross-subsidy and discrimination;
- So long as channel capacity is scarce, to limit the number of channels that an OVS operator is permitted to select to one-third of the activated channels, exclusive of must carry and PEG requirements, but including the shared channels;
- To establish procedures that guarantee programmers nondiscriminatory access to OVS system facilities;
- To mandate procedures that prevent discrimination against unaffiliated programmers in the provision of information to subscribers;
- To provide for selection of the channel administrator based upon the collective determination of the programmers using capacity on the system, and to provide for the classification of channels, exclusive of must carry and PEG channels, as "shared" only when programmers enter into agreements for the simultaneous carriage of a program network on the facility;
- To prohibit, until effective telephone service competition is a reality, the joint marketing of telephone service and telephone company-provided OVS transmission or programming services, unless customers are simultaneously made aware of video transmission and programming alternatives by cable operators, in a manner that gives no advantage to OVS over competing cable operators or unaffiliated packagers/programmers;
- To permit incumbent cable operators the same choice as is available to incumbent LECs to provide OVS service in lieu of franchised cable service;
- To require a demonstration of compliance with Commission policies, regulations and procedures, including cost allocation regulations, prior to certification, and to further require ongoing compliance following certification; and
- To require telephone companies holding outstanding commercial video dialtone applications to choose between franchised cable service and OVS service following a reasonable transition period.

Action in each of these areas is necessary to establish an effective regulatory regime.

I. THE COMMISSION MUST GUARANTEE PROGRAMMERS NONDISCRIMINATORY ACCESS

The obligation to provide nondiscriminatory access distinguishes OVS operations from traditional cable system arrangements. Under traditional arrangements, cable operators exercise editorial control over all of their channels, except for those channels devoted to must carry, PEG access and leased access. OVS is different. The key distinctions between OVS and traditional cable are that with OVS (1) the manager of the facility does not exercise editorial control over the vast majority of the channels; and (2) the manager of the OVS facility is not required to obtain a local cable franchise and is not subject to most local regulation.

In creating the OVS option, Congress undertook a conscious trade-off of policy goals. Traditional cable, in which the cable operator functions as editor on most channels, is fully subject to Title VI, including the franchise requirement. In contrast, in return for ceding control of up to two-thirds of the system capacity, which must be made available nondiscriminatorily to non-affiliates, the OVS operator is relieved of the franchise requirement. The choice between these options is left to the facility provider.[1]

Commission oversight of the OVS operator is needed because a LEC-affiliated OVS operator is specially positioned to compete unfairly against unaffiliated packagers and

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[1] While the Telecommunications Act provides the Commission with limited flexibility to adopt OVS rules, there is no choice when it comes to nondiscriminatory access. The statute is unequivocal on this point. It directs the Commission to adopt regulations that "prohibit an operator of an open video system from discriminating among video program providers with respect to carriage." Telecommunications Act of 1996, §653(b)(1)(A) ("1996 Act"). The only exceptions are must carry and PEG obligations. This is in contrast to the greater flexibility associated with the rates, terms and conditions for carriage which, in addition to being "just and reasonable," must be also "not unjustly or unreasonably discriminatory." Id. (emphasis supplied). There is no equivalent qualification for carriage itself, which must be provided without exception.

programmers. Without effective Commission supervision, the LEC can over-allocate costs to the telephone operation and under-allocate costs to OVS. The resulting misallocation could enable the LEC to fund a strategy of predatorily pricing video programming service rates to end-users. The OVS operator's programming operation is, after all, in competition with other potential providers of programming on the open video system. The Commission must stand ready to intervene to prevent discrimination of this sort.

The Commission's proposal "to adopt a regulation that simply prohibits an open video system operator from discriminating against unaffiliated programmers in its allocation of capacity,"[2] and to "allow the open video system operator latitude to design a channel allocation policy consistent with this general rule,"[3] will not guarantee nondiscriminatory access for programmers. Moreover, if adopted, it can effectively eliminate the trade-off inherent in OVS that relieves the OVS operator from the franchise requirement in return for providing nondiscriminatory access to programmers on two-thirds of the available channels.

The potential for discrimination warrants an effective program of Commission oversight. As described below, the Commission must establish procedures to effectively enforce nondiscrimination.

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[2] Implementation of the Telecommunications Act of 1996, Open Video Systems, FCC 96-99, rel. Mar. 11, 1996, at 8. ("Open Video Systems").

[3] Id.

A. Channel Counting, Channel Sharing and Channel Positioning

Where the demand for capacity exceeds the supply, the Telecommunications Act bars "an operator of an open video system and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity."[4] The interpretation of one-third in these circumstances is absolutely critical, because it can decide the number of available channels and the scope of potential competition.

1. Channel Counting

The NPRM proposes to satisfy a portion of the OVS operator's must carry/PEG requirement by taking the channels needed for must carry and PEG "off the top" of the activated channel total, and granting the OVS operator access to one-third of the remaining channels. Under the example put forth in the NPRM, "if there are 90 channels on an open video system, 15 of which are devoted to PEG and must carry requirements, the open video system operator would be entitled to select the programming on one-third of the remaining 75 channels -- i.e., 25 channels."[5]

NCTA agrees with this proposal. It represents a middle ground between requiring the OVS operator to satisfy the must carry/PEG carriage requirements by utilizing a significant proportion of its exclusive allocation (in the above example, 15 of 30 channels) for must/PEG channels, and not using any portion of its capacity for this purpose. By effectively requiring the OVS operator to use a portion of its mandated channel allocation for must carry/PEG stations, while providing that other users satisfy the rest, the Commission would establish the policy that

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[4] 1996 Act, §653(b)(1)(B).

[5] Open Video Systems at ¶ n.34.

packagers share the responsibility for must carry/PEG carriage.

The Commission must also decide whether to require the inclusion of shared channels for purposes of determining the one-third of system capacity that the OVS operator may control. The statute answers this question. It provides that, where demand for channels exceeds the supply, the OVS operator or its affiliates are prohibited *"from selecting* the video programming services for carriage on more than one-third of the activated channel capacity."[6] If the OVS operator, either exclusively or in consultation with other programmers, "selects" the shared channels, it is engaged in channel selection for purposes of Section 653 (b)(1)(B). The OVS operator is not entitled to select more than one-third of the available channels, even if these channels are also selected by other packagers for purposes of sharing.

Any other interpretation places the OVS operator in a position to "select" significantly more than one-third of the activated channels. Returning to the Commission's example, if the OVS operator were permitted to select one-third of the channels for its exclusive use plus the shared channels, the prospect for effective intra-modal competition could be defeated. If, for example, thirty of the remaining 50 channels were classified as "shared," only 20 would be left over for competitors. Even if only one competitor emerged, that competitor would be at a significant competitive disadvantage in relation to the OVS operator.

2. Channel Sharing

The competitive situation would be tilted even more strongly (and unfairly) in favor of the facility provider if, as the Commission proposes, the OVS operator is allowed to decide

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[6] Id. (emphasis supplied).

"how and which programming is selected for shared channels."[7] The NPRM maintains that, under the Telecommunications Act, the agency has no choice but to grant this discretion to OVS operators. But there is no basis in law for the Commission's conclusion, and the proposal represents unsound policy.

To the contrary, the Act's grant of discretion to the OVS operator is much more limited. The Act permits

> an operator of an open video system to carry on only one channel any video programming service that is offered by more than one video programming provider (including the local exchange carrier's video programming affiliate), provided that subscribers have ready and immediate access to any such video programming service[8]

This language does not authorize the OVS operator to decide that particular program networks should be shared, while others may be offered on an exclusive basis. As the Commission recognizes elsewhere in the NPRM, that authority is left to program producers, vendors, and other entities responsible for programming content. Their right to "exercise control over their products"[9] is to be neither altered nor diluted by the adoption of the Commission's proposal. The statute merely authorizes the "physical" or "technical" act of carrying a program network "selected" by multiple programmers on the same portion of bandwidth.

The statute authorizes the technical act of channel sharing so that the OVS operator will not be required to carry the same program network on multiple channels. The provision addresses a practical problem that arose in numerous video dialtone proposals. Anticipating that

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[7] Open Video Systems at 1[illegible]

[8] 1996 Act, § 653 (b)(1)(C[illegible]

[9] Open Video Systems at 1[illegible]

the limited analog capacity would be oversubscribed if multiple packagers were forced to carry the same programming on different channel slots, and that certain popular networks would be sought by multiple packagers. Telephone companies proposed and the Commission agreed in principle that technical arrangements should be permitted to avoid unnecessary duplication.

For example, recalling the above 90 analog channel example, if three packagers each propose to carry C-SPAN I on the system, there is no rational reason, so long as technical and economic factors can be overcome, for that network to occupy three of the 90 available channels. Instead, it is preferable to carry C-SPAN I on only one channel slot, which would be made available to each of the three packagers that seek to carry the particular programming. This arrangement, if practicably workable, conserves scarce channel capacity and makes additional capacity available for other programmers to display their product. The likely result is enhancement of competition through the addition of more programmers able to compete for the attention of audiences, and an increase in program diversity.

The channel efficiency called for by the statute can be accomplished without allowing the OVS operator to select these shared channels. Under copyright law, each entity proposing to offer programming on the OVS facility should be permitted to negotiate with the program network its proposes to distribute. (As noted, the Commission explicitly acknowledges the right of the program network to control its product. See Open Video Systems at 17.) Thus, channel sharing cannot be required with respect to a particular program network if the packager's arrangement with the program network does not explicitly permit such carriage. However, (if and only if) two or more programmers agree to carry a program network, and are permitted to do so pursuant to appropriate license agreements, even if one of those entities is not the OVS

operator, the program network may be required to be carried on a shared channel.

The Commission asks whether the OVS operator should be required to include channels it selects for inclusion within its package on a shared basis within the one-third limitation if the choice of the particular networks is delegated to an independent entity. The answer is yes. Under our proposal, channel sharing will arise only if more than one packager "selects" a particular network for carriage. If only one packager "selects" the network, it will be available on an exclusive basis. (A channel sharing arrangement in which the OVS operator decides which channels will be shared, or in which that function is delegated to an independent entity selected by the OVS operator, makes no sense unless more than one packager wants to carry a particular network and "share" bandwidth on the system.) If an OVS operator, directly or through an independent entity that it chooses, selects the shared channels, those channels should be charged against the one-third limitation. Any other result circumvents the one-third limitation.

The Commission further proposes to permit the OVS operator, automatically, to either act as channel administrator on the shared channels, or to select the entity that will perform this function. This approach is wrong. Instead, all programmers taking capacity on the system should agree upon an administrator, or share in the administration of the system. We do not mean a new bureaucracy needs to be created. For instance, an employee of each programmer, including the OVS operator, could be selected to meet as a group to decide by consensus questions of administration. At a time when policymakers are moving away from the control by monopoly entities of systems and processes used by many to deliver competitive services, such as the determination that the North American Numbering Plan is to be independently

administered, adoption of the NPRM proposal would be a step backward.

3. Channel Positioning

The channel administrator, in addition to making arrangements for channel sharing, should also facilitate the positioning of channels. As the NPRM acknowledges, there are marketing advantages to lower channel numbers. The administrator in consultation with each of the programmers, including but not limited to the OVS operator's programming entity, should be permitted to determine channel locations. It may be reasonable to locate the shared channels on the lower channel slots in recognition of their presumed popularity.

Channel allocations for other programmers should be awarded on a nondiscriminatory basis. Channels might be allocated by lot in groups to packagers that purchase groups of channels.

B. Analog/Digital Issues

Marketplace reality dictates the separate treatment of analog and digital channels "for purposes of allocating capacity or the right to select video programming on open video systems."[10] Digital capacity is not expected to be available to consumers on a widespread basis in the near term. For now, technical and cost considerations limit its use.

The limited use of digital capability in existing broadband transmission networks, and the paucity of digital set-top boxes in the hands of consumers, means that programmers are almost certain to view the digital option as no option at all. If forced to use digital channels on a system in which their programming competitors have the use of analog channels, programmers

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[10] Id. at 11.

will be competitively disadvantaged. The Commission should recognize that analog and digital transmission service are not the same service, analog channels are much preferred to digital channels in the near term, and a decision by the OVS operator to claim analog capacity for its own programming service, while leaving digital capacity to competitors, would constitute unjust and unreasonable discrimination.

C. No Discrimination in Providing Information to Subscribers

The Act prohibits an OVS operator "from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purpose of selecting programming on the open video system, or in the way such material or information is presented to subscribers."[11]

The Commission finds "this section is a specific application of the non-discrimination requirement."[12] The plain purpose is to prevent the OVS operator from using its status as the provider of the facility to advantage its programming service over other program services and broadcast stations. The provision should be read as congressional recognition of the OVS operator's ability, in the absence of regulation, to unfairly advantage its own programming venture, and a declaration of policy that effective implementation is needed to level the competitive playing field for unaffiliated programmers utilizing the OVS platform.

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[11] Id. at 19, citing 1996 Act, §§653(b)(1)(E)(II) and (iii). The Act further requires that unaffiliated programmers and copyright holders are able to "suitably and uniquely identify their programming services to subscribers" and that an OVS operator not change or alter any identification that is transmitted as part of the programming signal. The Act also bars an OVS operator from "omitting television broadcast stations or other video programming services carried on such system from any navigational device, guide or menu."

[12] Open Video Systems at 20

To the extent that the OVS operator provides program guides, menus and navigation devices, it must ensure that end-users, including those that have presubscribed to its package, remain continually aware of their programming options. Descriptions by OVS facility personnel of programming available over the OVS facility, as well as "hard copy" and electronic program guides, should describe and display available programming choices, including local broadcast stations, in a nondiscriminatory manner. On the same grounds, navigation devices provided by the OVS operator must not advantage the programming package or packages of its affiliate.

D. Capacity Issues

1. Capacity Allocation Procedure

Demand for channel capacity may exceed the supply, particularly because most OVS operators are likely to offer only analog channels in the near term. When that happens, and in anticipation of the possibility the Commission should establish a procedure to allocate capacity on a nondiscriminatory basis. Without Commission standards, programmers will need to learn of each OVS operator's channel allocation procedure in each jurisdiction, a potentially resource-consuming endeavor.

NCTA proposes that OVS operators be required to advertise the availability of capacity to potential programmers, packagers and the public, at the publicly-filed rates the OVS operator intends to charge, and then to conduct an open enrollment period for at least four weeks. All packagers/programmers that seek capacity within the four-week period would be considered to have sought capacity at the same time for purposes of the first-come, first-served procedure.

If at the conclusion of the four week period the OVS operator finds the channel requests exceed the available capacity, a meeting of the packagers would be convened to announce the

results. There would then commence a second four week period during which all of the parties seeking capacity, including the OVS operator's programming affiliate, would have an opportunity to determine whether and to what extent shared channels could be used in lieu of exclusive channels. Thereafter, the remaining channels available for exclusive use would be allocated by the OVS operator in proportion to the number of channels requested.

2. Maximum/Minimum Capacity Limits

The statute is "as plain as day" on the issue of the percentage of capacity that an OVS operator may select when other entrants want the remaining channels; that is, "one-third." The explicit language prohibits, when demand exceeds supply, "an operator of an open video system and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channels on such system."[13] "One-third" means "one-third." If an OVS operator needs more channels, it can build them.

The Commission asks whether one-third might not mean one-third when only one other packager besides the OVS operator seeks capacity on the system. The statute means what it says. If Congress intended an exception to the one-third limitation where only one unaffiliated packager seeks capacity, it could have said so. It did not.

As to minimum term requirements, the Commission should require OVS operators to accommodate part-time users. For decades, cable operators have been offering public access users blocks of time on channels, rather than requiring their use on a full-time basis. In contrast, telephone company video dialtone tariffs attempted to impose a minimum one month charge.

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[13] 1996 Act, § 653(b)(1)(B).

The Commission has previously questioned why, if cable operators are able to accommodate part-time users, telephone companies cannot do the same.[14]

Companies proposing to offer OVS must explain why they, unlike traditional cable operators, are either unable or unwilling to offer time to part-time users. Without good cause to the contrary, the Commission should include within the certification process a requirement that OVS operators agree to serve part-time users.

3. Changes in Demand/Capacity

The Commission seeks comment on the adoption of a procedure to account for situations in which the OVS operator, finding that some unused capacity is available, decides to exceed the one-third limit. The issue is whether, in these circumstances, the operator upon receiving a request for channels by a non-affiliate should relinquish capacity immediately, following a transition period or not at all.

Requiring the OVS operator's programming entity to immediately relinquish channels could cause unjustified disruption to the entity's business plans and to the expectations of its customers. At the same time, however, the OVS operator has a continuing obligation to make capacity available following a transition, and if not, to construct additional channels.

The Commission should take several steps to take account of new requests following the conclusion of the initial open enrollment period. First, OVS operators should be required to provide capacity to part-time users. These programmers cannot anticipate their demand for

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[14] Ameritech Application Operating Companies, Order and Authorization, 10 FCC Rcd. 4104, 4118 (1995). ("As NCTA points out, the cable industry has accommodated part-time users for years.")

channel capacity, and as a matter of policy their programming should be able to find its way onto the system.

The OVS operator should be given greater flexibility to accommodate programmers seeking larger channel blocks on limited capacity systems. The OVS operator should remain subject to the one-third limitation. But if it is occupying channels because unaffiliated programmers have not sought capacity during a prior open enrollment period, a reasonable transition period of up to one year is appropriate. During that period, the OVS operator can either arrange for additional capacity or relinquish the channels to which the unaffiliated packager is entitled.

The one-year transition should be subject to two material qualifications. First, if in the interim the OVS operator upgrades its system and has available additional capacity, that capacity should be subject to an open enrollment period during which the unaffiliated programmer can request channels. Second, the unaffiliated programmer should be entitled to share any channel on the system, so long as it has properly arranged for carriage with the appropriate program network.

4. The "Head Start" Problem

The nondiscriminatory access requirement should be interpreted to prohibit the commencement of service by the OVS operator to its affiliate prior to the availability of transmission service to competitors (using the OVS facility). The OVS operator should not use its control over the facility to obtain the marketing advantage of a "head start" over other programmers. The Dover Township, New Jersey video dialtone system strikingly illustrates the problem. In Dover Township, Bell Atlantic commenced service last January for a favored

packager, even though other programmers on the system, who believed they had obtained capacity through a Commission-supervised open enrollment period, (to our knowledge) are still unable to reach subscribers. This situation should not be repeated.

E. Dispute Resolution

Finally, the Commission should adopt concrete procedures to make clear to OVS operators that discrimination and other forms of anticompetitive and anticonsumer practices will not be tolerated. The Act provides a procedure for the resolution of disputes arising under the open video systems section. While the statute requires the resolution of disputes within 180 days, the Commission should not interpret this provision as permitting OVS operators to act in a discriminatory manner for a full 180 day period prior to resolution. Nor should the Commission invite an entirely open-ended procedure in which OVS operators are permitted to argue the appropriateness of blatantly discriminatory conduct under the Act's "not unjustly or unreasonable discriminatory" standard.

II. THE ACT REQUIRES JUST AND REASONABLE OVS RATES

The Telecommunications Act directs the Commission to adopt regulations to "ensure that the rates, terms, and conditions" for the carriage of programming on an open video system "are just and reasonable and are not unjustly or unreasonably discriminatory."[15] The NPRM, however, identifies several statutory and policy rationales that all seem to argue against the acceptance by the Commission of an affirmative responsibility to ensure that rates are just and reasonable. The Commission notes that Congress did not contemplate that OVS operators

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[15] 1996 Act, § 653(b)(1)(B).

would be regulated as common carriers, and that the conferees did not intend for "Title II-like" regulation to be imposed. It is further observed that OVS operators will likely lack market power in relation to end-users and will almost certainly face competition from incumbent cable operators. The NPRM points out, in addition, that Congress provided for only a limited period in which to review requests for certification. The NPRM suggests the limited review period has implications for the type of certification process that the Commission ultimately adopts.

As a factual matter, there are regulatory schemes other than the common carrier model for insuring fair rules for programmers. The Cable Services Bureau has an alternative rate regulatory model -- the cable rate regulatory scheme, adopted by the Commission following passage of the 1992 Cable Act -- which is neither common carrier regulation nor Title II-like.

The NPRM further errs in contending that an effective rate regulation scheme is not needed because OVS operators are likely to lack market power vis-à-vis *end users*. The end-user rate does not tell the whole story. OVS operators are obliged under the statute to charge just and reasonable rates to *other programmers*. The reason for Congress' focus on this relationship is obvious -- OVS operators will control a bottleneck facility and will have strong incentives to use that control to disadvantage competing *programmers*. If channel capacity rates are not subject to regulation, OVS operators might try to charge unaffiliated programmers rates so high that they are dissuaded from entering the market. Moreover, by focusing on the OVS operator-end user relationship, the Commission ignores the possibility that the OVS operator will engage in a price squeeze, charging unjustifiably high rates to programmers for access, while keeping the end-user rate at competitive levels.

The limited review period does not automatically justify no review, any more than the short period provided for an initial FCC order and reconsideration justifies no regulations. Congress did not say, after all, that because of a limited period for review of certification, OVS rates are subject to marketplace regulation. To the contrary, Congress imposed upon the Commission an affirmative duty to either find that the proposed rates are just and reasonable or to reject the rates and with it the certification.

However challenging this statutorily-mandated process requires the Commission to find that the rates charged to programmers are "just and reasonable" when measured against some standard that the agency finds appropriate to the circumstances. Although NCTA does not support any particular standard at this time, it believes the Commission can take two additional regulatory steps to facilitate an efficient OVS marketplace.

First, the Commission must remain involved in the supervision of rates to the extent necessary to warrant that they are not discriminatory. OVS operators should not be permitted to charge different rates for the same transmission services. The Commission must stand ready to promptly resolve complaints. And, in addition, it may be necessary to adopt a rule under which an OVS operator is required to offer transmission service at the same per channel rate to all customers.

Second, the public filing of rates is a necessary safeguard to protect nonaffiliates against rate discrimination. Public filing will aid in detection if OVS operators charge different rates to

different programmers without any justification. It will also facilitate charging the same rates to the OVS operator's programming entity as are charged to nonaffiliates.[16]

Most significantly, regulatory parity is necessary: if no plan is adopted to regulate rates to programmers here, the same policy considerations should apply to regulation of rates to programmers for commercial leased access offered under Section 612 of the Cable Act. If the Commission decides that the rates for open video system service--the leasing of transmission capacity over a closed system to programmers--are not subject to rate regulation on the grounds that the marketplace is competitive, it follows that the rates for commercial leased access should also be deregulated. This conclusion is consistent with Congress' judgment that cable rates should not be subject to regulation where consumers have effective competitive alternatives.

III. THE COMMISSION MUST ESTABLISH EFFECTIVE SAFEGUARDS

The prospect of incumbent LECs offering open video system services over integrated transmission facilities requires that the Commission establish safeguards against cross-subsidy and discrimination. The Commission should take three concrete steps to limit these risks. First, effective procedures must be adopted to allocate costs between incumbent LEC telephone operations and OVS, and the proceeding to establish these procedures must be completed prior to the initiation of open video system service. Second, incumbent LECs should be barred from the joint marketing of telephone service and OVS in response to customer-initiated calls, unless

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[16] With respect to public filing, the Commission has proposed that contracts between an open video system provider and video programming providers be made publicly available. See Open Video Systems at 15. We ask the Commission to clarify that this proposal does not contemplate the public availability of program license agreements between either programming networks or video programming providers. These program license agreements would remain subject to all of the confidentiality provisions contained within them.

they simultaneously inform customers of cable service alternatives. Finally, incumbent LECs should be required to provide open video system service through a separate corporate subsidiary.

A. Cost Allocation

Effective regulations that protect telephone ratepayers and LEC competitors from cross-subsidization are an essential ingredient of the OVS regulatory scheme. Without effective regulations in this area, telephone companies will be able to gain an unfair competitive advantage over other providers of multichannel video distribution services. This unfair advantage will be achieved at the expense of telephone ratepayers who will be forced to pay higher rates, or who will not enjoy rate reductions as great as should be the case.

The Commission properly asks "what steps local exchange carriers should be required to take prior to certification with respect to establishing cost allocation procedures between regulated and nonregulated services under Part 64 of the Commission's rules."[17] By asking this question, the Commission recognizes that, in contrast to the transmission component of the video dialtone service which is subject to regulation under Title II of the Communications Act, OVS will be regulated under the Part 64 Joint Cost rules.

While determining that Part 64 rules will apply to separate the costs of OVS and telephone transmission service, however, the Commission does not explain how the system will work. Indeed, the Commission explicitly puts off the resolution of cost allocation procedures to a separate proceeding. Although the Commission requires a separation of costs between

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[17] Id. at 28.

telephone service and OVS, LECs may not have been given sufficient direction to actually apply the Part 64 procedures, and the necessary guidance will not be forthcoming until the Commission acts in the separate proceeding.

This is not to say that the decision to apply Part 64 will not have profound consequences. As Dr. Leland L. Johnson observes in the attached Declaration, "These rules are of key importance to protecting against cross-subsidization, because they govern the segregation of costs for providing regulated telecommunication services from the costs of unregulated services such as OVS."[18] By deciding to apply Part 64, the Commission has chosen the proper framework from which to derive the more specific requirements. These regulations are so important that until they are adopted in the forthcoming separate Common Carrier Bureau proceeding, certification requests should not be entertained.

The Part 64 framework is consistent with the application of a stand-alone cost test as a starting point to the determination of the pricing of LEC services delivered over an integrated network. Under the stand-alone cost procedure, which is explained more fully in Dr. Johnson's Declaration, "the costs allocated to the regulated sector are no greater than the stand-alone cost of whatever telephone services are to be provided on the common transmission network with OVS. Otherwise, ... OVS will bear less than its incremental cost, resulting in a subsidy from telephony."[19]

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[18] Declaration of Dr. Leland L. Johnson, Mar. 28, 1996, at 11, appended to NCTA Comments ("Johnson Declaration").

[19] Id. (emphasis in original